BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION NANCY KEENAN STATE OF MONTANA * * * * * * * * * * * * * * * * * BOARD OF TRUSTEES, ROSEBUD COUNTY SCHOOL DISTRICT NO. 19, COLSTRIP, MONTANA, Respondent/Appellant, VS. DECISION AND ORDER

ELMER R. BALDRIDGE,

Petitioner/Respondent.

STATEMENT OF CASE

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Elmer R. Baldridge (Baldridge) was a tenured teacher with Rosebud County School District No. 19, Colstrip. It was recommended to the Board of Trustees by the District Superintendent that Baldridge be dismissed pursuant to Section 20-4-207, MCA, for unfitness, incompetence and violation of school board policies. A hearing before the school board was held and following the hearing the Board voted to accept the Superintendent's recommendation that Baldridge be dismissed.

Baldridge appealed the decision of the Board to the County Superintendent. A hearing was held before Acting County Superintendent Shirley M. Barrick which was recessed pending appeal of a denial of a motion for continuance. Upon remand by the State Superintendent, the matter was heard. On November 16, 1989, Coun

Superintendent Barrick issued an order reinstating Baldridge with pay. The School District has appealed the decision of the County Superintendent.

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DECISION AND ORDER

This matter is vacated and remanded for further findings in conformance with this opinion. Further hearing is not appropriate. The County Superintendent is directed to consider all evidence before her and to make a determination as to whether the trustees dismissed Baldridge with or without good cause.

MEMORANDUM OPINION

The standard of review by the State Superintendent is set forth in 10.6.125 ARM. This rule was modeled upon Section 2-4-704, MCA, and the Montana Supreme Court has interpreted the statute and the rule to mean that agency (County Superintendent) findings of fact are subject to a clearly erroneous standard of review and that conclusions of law are subject to an abuse of discretion standard of review. Harris v. Bauer, 230 Mont. 207, 749 P.2d 1068, 1071, 5 St. Rptr. 147, 151, (1988). Further, the petitioner for review bears the burden of showing that they have been prejudiced by a clearly erroneous ruling. Terry v. Board of Regents, 220 Mont. 214, 217, 714 P.2d 151, 153 (1986). Findings are binding and not "clearly erroneous" if supported by "substantial credible evidence in the record." This has been further clarified to mean that a finding is clearly erroneous if a "review of the record leaves the court with the definite and firm conviction that a mistake has been committed."

Section 20-4-207 (5), MCA, requires that on appeal the county superintendent must determine if the dismissal by the trustees was made with good cause. 10.6.119 ARM, mandates that findings of fact shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings based exclusively on the evidence and that each conclusion of law be supported by authority or by a reasoned opinion.

The existence of specific findings is essential to preserve the limited scope of this Reviewer's inquiry. The absence of findings invites a reweighing of the evidence on review, thereby paving the way for intrusion into matters committed to administrative decision. The findings must be sufficiently certain to enable this Superintendent to ascertain with reasonable certainty the factual basis and legal principle upon which the County Superintendent acted.

Numerous allegations of error have been proposed and exhaustive briefs have been filed. Many of the arguments of respondent's counsel address issues that either were not before the County Superintendent or are not issues on appeal to this Superintendent.

Although in the form of a finding of fact rather than a conclusion of law, the County Superintendent found that the Chairman of the Board violated the requirements of that section in that he did not call a board meeting prior to notifying Baldridge of the recommendation for dismissal. This finding is affected by

error of law.

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The notification is statutorily required and the board is without discretion. Section 20-4-207(3)(a), MCA. The Montana Supreme Court has held that someone other than the trustees is authorized to send out a statutorily required notification in the absence of specific board authorization. School District No. 4, Lincoln County v. Colburg, 169 Mont. 368, 547 P.2d 84 (1976).

Two recent Montana Supreme Court cases are relevant to this issue. These two cases involved reductions in force and subsequent In both cases, the districts did not provide termination. pretermination hearings before acting the district on superintendent's recommendations. Birrer v. Trustees, Wheatland County School District No. 15, 47 St. Rptr. 247 (1990) and Harris v. Trustees, Cascade County School Districts No. 6 and F, 47 St. Rptr. 260 (1990). The Court held that unless the "substantial rights of the appellant have been prejudiced," the terminations will be upheld.

Baldridge received a hearing on his dismissal and participated in that hearing with the aid of counsel. He received all required notifications in a timely manner. The ministerial acts of the chairman caused no prejudice to the due process rights of Baldridge in the process leading up to his hearing before the board.

The credibility of witnesses and the weight of the evidence is to be decided by the trier of fact, the County Superintendent, who had the opportunity to judge the demeanor of the witnesses.

This Superintendent cannot substitute her judgment for that of the fact-finder.

Conclusion of law number 2 states:

"This Acting County Superintendent does not approve of the conduct displayed by the Petitioner on March 30, 1988, but all other accusations heard in the hearing were hear say (sic) and interpretations without any previous written documentations in personnel file or on evaluations."

Given her exclusion of all other evidence as hearsay or undocumented interpretations, it appears the only evidence the County Superintendent considered was that in support of the March 30, 1988 incident. Therefore, this Superintendent can only infer that the Hearing Officer did not assess the credibility of the witnesses nor weigh the evidence on the other allegations, and concluded this one incident was not "good cause" to dismiss a tenured teacher.

The Hearing Officer is bound by common law and the statutory rules of evidence. 10.6.115, ARM. Hearsay is a question of evidence to be decided at the time the testimony is offered. There must be an objection and a ruling. The record does not show hearsay objections which were sustained by the Hearing Officer.

The statements made by the students who testified were derived from their own personal knowledge and perceptions. The testimony offered, therefore, is direct evidence which must be considered by the Hearing Officer. There is no evidence showing that the board is required to have written documentation of disciplinary measures previous to dismissal.

DATED this 26 day of September, 1990. CERTIFICATE OF SERVICE This is to certify that on this $27^{1/2}$ day of September, 1990, a true and exact copy of the foregoing <u>DECISION AND ORDER</u> was mailed, postage prepaid, to the following: Charles E. Erdmann ERDMANN LAW OFFICE P.O. Box 5418 Helena, MT 59604 Charles F. Moses P.O. Box 2533 Billings, MT 59103-2533 Shirley Barrick Fergus County Superintendent County Courthouse Lewistown, MT 59457 Paralegal Assistant Office of Public Instruction